In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1431

WILLIAM CORWIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On February 14, 1968, an indictment was returned in the United States District Court for the Central District of California charging petitioner with receiving, concealing and facilitating the transportation of one kilogram of unlawfully imported marihuana on January 17, 1968, in violation of 21 U.S.C. 176a (Count 1), selling that quantity of marihuana on the same date, in violation of 21 U.S.C. 176a (Count 2), and transferring the marihuana not pursuant to a

written order form, in violation of 26 U.S.C. 4742(a) (Count 3). A fourth count charged petitioner and two others, Trujillo and Blatt, with receiving, concealing and transporting 209 kilograms of unlawfully imported marihuana on January 25, 1968, in violation of 21 U.S.C. 176a.

Petitioner initially pleaded not guilty to all counts. He filed a pretrial motion to dismiss the indictment on the ground that the statutes with which petitioner would have had to comply in order to import the marihuana lawfully would have required him to incriminate himself. The motion was denied.

On April 16, 1968, petitioner went to trial jointly with Trujillo. On the first day of trial, federal narcotics agent Canady testified that on January 17, 1968, he met petitioner at the residence of a named informant in Hollywood, California, and that he purchased one kilogram of marihuana and 100 capsules containing LSD from petitioner (Tr. 63-66).[1] Canady, who had represented himself as a buyer from New York, expressed an interest in additional purchases before he left the Los Angeles area. On January 25, at a bowling alley in East Los Angeles, Canady met with petitioner, co-defendant Blatt and co-defendant Trujillo, who was petitioner's source (Tr. 82), and agreed to purchase 200 kilograms of marihuana. During the negotiations Trujillo told Canady "that he obtained his marijuana directly from Mexico" (Tr. 70). As the transaction was about to

[1] The two-volume transcript of trial (designated herein as "Tr.") has been filed with the Clerk of this Court.

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be consummated, petitioner and the co-defendants were arrested by Canady and other agents. Two other federal agents and the informant also gave testimony on the first trial day, substantially corroborating agent Canady's account.

At the beginning of the second day of trial, petitioner moved for a change of plea to guilty of Count 2 (selling unlawfully imported marihuana on January 17). The trial judge inquired at length into the voluntariness of the plea, and received responses from petitioner that he had discussed the matter with counsel; that he was aware of the maximum penalty (which he recited); that no promises or threats had been made; that his mind was clear; and that he was in fact guilty and was making no claim of innocence (Tr. 136-145). When the court accepted the plea, the remaining counts were dismissed on motion of the government.[2] On May 13, 1968, petitioner was sentenced to imprisonment for five years. He then filed a timely notice of appeal, alleging that compliance with 21 U.S.C. 176a would have incriminated him. On February 17, 1970, the court of appeals affirmed (Pet. App. A).

In this Court petitioner renews his argument that compliance with the laws against importation of marihuana would have required him to incriminate himself. That specific issue has been considered and

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[2] Initially, government counsel indicated that he would wait until after sentencing to request dismissal of the other three counts. The court noted that this could not be done, since petitioner was on trial on the other counts and, a jury having been sworn, jeopardy had attached (Tr. 138).

decided adversely to petitioner by a number of other lower courts, and review thereof has consistently been denied by this Court. *E.g.*, *Barsaloux* v. *United States*, 419 F. 2d 1299 (C.A. 5), No. 1043, this Term, certiorari denied, March 9, 1970; *Witt* v. *United States*, 413 F. 2d 303 (C.A. 9), certiorari denied, 396 U.S. 932. See also *Pickett* v. *United States*, 223 F. Supp. 695, 696 (S.D. Cal.), certiorari denied, 379 U.S. 939; *Rule* v. *United States*, 362 F. 2d 215 (C.A. 5), certiorari denied, 385 U.S. 1018. The courts have recognized that there is no factual basis for a claim that an unregistered importer of marihuana would incriminate himself if he openly declares the marihuana on arrival at a port of entry. As the court reasoned in *Pickett*, *supra*, 223 F. Supp. at 696:

> • • • When petitioner came from Mexico, and until petitioner passed the Port of Entry, or disregarded his first opportunity to present the marihuana to the Customs at such Port of Entry, he had not *entered* the United States. Had he invoiced the marihuana at his first opportunity, he would have been relieved of it by the Customs agents, and thus would not have smuggled it, and would not have been *in possession of it within the United States.*

Thus, petitioner did not face any "real and appreciable" risk of incriminating himself under State or federal laws relating to marihuana[3] (see, *e.g.*, *Buie*

[3] Petitioner mistakenly asserts (Pet. 4) that *Leary* v. *United States*, 395 U.S. 6, and *United States* v. *Covington*, 395 U.S. 57, bestow upon a seller of marihuana the right to assert

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v. *United States*, 396 U.S. 87), and his claim is without substance.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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the Fifth Amendment privilege as a defense to a charge of violating 26 U.S.C. 4742(a). See *Buie* v. *United States*, 396 U.S. 87, holding to the contrary. Insofar as *Leary* dealt with 21 U.S.C. 176a, it merely foreclosed the government's reliance at trial on the statutorily prescribed presumptions arising from possession of marihuana. By pleading guilty, petitioner admitted each element of the offense, including the knowledge that the marihuana he sold had been unlawfully imported. No question of an inference from the fact of possession therefore ever arose here.

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